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Attorneys for Respondent.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),

Petitioner,

vs.

JOSEPHINE BOBO, as Administratrix of the Estate of Perry E. Bobo, Deceased,

Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One.

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STATEMENT OF THE CASE.

This is an action brought by respondent to recover damages for the death of her husband which occurred while he was employed by petitioner in interstate commerce. The action is brought pursuant to the provisions of the statute of the United States commonly known as the Federal Employers' Liability Act.

Decedent had been employed for some six months before his death as a bridge tender on the railroad bridge of petitioner Northwestern Pacific Railroad Company, which bridge crosses a navigable waterway known as Petaluma Slough. His hours of employment were from 9:00 p. m. to 5:00 a. m. He came to work as usual at 9:00 p. m. on the night of February 3, 1930, and was never seen alive thereafter. Two weeks later his body was discovered in the water some miles from the bridge. There were no eye-witnesses to the accident. The only evidence concerning the decedent's activities on the night he disappeared was an entry in his handwriting in the log book on the bridge, showing that a steamer passed through at 1:20 a. m. What caused him to fall or jump into the water and whether he did fall or jump from the bridge is unknown. There was a steel stairway leading from a platform at the track level up to the control house at the top of the bridge. It is the theory of respondent that the decedent either in going up or coming down this steel stairway slipped and fell off the platform at the foot of the stairway into the water. Respondent charged negligence by petitioner in the maintenance of this steel stairway and platform (paragraph V of complaint, R. 2), the specific charges of negligence, as shown by the testimony of respondent's witnesses (R. 31, 32, 76, 77, 79), being (1) that the steps and platform at the bottom thereof were worn smooth and were slippery when wet; (2) that a single handrail only was maintained on each side of the stairway and platform which left sufficient space so

that a person falling or slipping on the stairs could slide under the handrail and into the water.

The evidence showed (R. 28; 29, 52, 63-64) that certain hairs similar to those on the sheepskin collar of a coat worn by the decedent and a spot resembling blood were found at or near the edge of the platform at the bottom of the stairs. One witness also testified that there was a bruise on the back of decedent's head when the body was recovered (R. 30). This evidence, it is claimed, was sufficient to show that the decedent fell off the bridge at that point. It is petitioner's contention that the evidence is insufficient to show that the decedent's fall—if it can be said he did fall—was caused by the alleged acts of negligence, to-wit, the slippery condition of the stairs and the absence of a lower handrail or toe-board.

The testimony discloses that there was maintained at one end of the bridge a small house where the bridge tenders customarily remained (see photograph R. 118-1), and that, whenever the bridge had to be opened to permit a vessel to pass through, the bridge tender was required to walk along the deck of the bridge to the steel stairway in question, go up the stairway, enter the control house, set the signals and open the draw. After the vessel had passed through and he had closed the draw he was required then to go down the stairway and inspect the track connections at each end of the span and then go back up the stairway to the control house and again set the signals so that trains could pass over the bridge. It thus required two trips up and two trips down the

stairway in question each time the bridge was opened for a vessel (R. 43-45-98).

It was also established that the steps and platform had been in the same condition as they were on the night of decedent's disappearance for some years prior thereto (R. 45), and that nearly every night, and particularly in the winter months, they were wet from dew (R. 57). It was also proved that it was necessary for the bridge tender to carry a lantern or flashlight with him at night while performing his work on the bridge (R. 49, 60). Upon these facts petitioner contends that decedent assumed the risk of using the stairway and platform, and was aware of the slippery condition of the steps when wet and of the single handrail.

SPECIFICATION OF ERRORS.

As indicated by the foregoing statement, petitioner urges a reversal of this case on two grounds:

1. That the evidence is insufficient to show that the death of decedent was proximately caused by any negligence on the part of petitioner;

2. That the evidence shows as a matter of law that decedent assumed the risk of using the stairway and platform of petitioner's bridge in the course of his employment.

NO CAUSAL CONNECTION HAS BEEN ESTABLISHED IN THIS CASE BETWEEN THE ALLEGED NEGLIGENCE OF THE PETITIONER AND THE DEATH OF DECEDENT.

It has been repeatedly held by this Court that, in order to sustain a recovery under the Federal Employers' Liability Act, plaintiff must not only prove negligence but prove causal connection between the negligence and the injury or death of the employee.

The record in this case is short and the evidence without conflict. The testimony upon which respondent relies in support of the allegations of negligence merely proved that the surface of the steps and platform of the steel staircase had been worn smooth and that the tops of the small iron knobs thereon had also been worn somewhat and were also smooth; that as a result of this smoothness the stairs and platform when wet were slippery (R. 31, 32, 76, 77, 79). It was further established that nearly every night in the winter time the stairs were wet with dew (R. 46), although there is no proof that the stairs were wet on the night decedent was last seen upon the bridge (R. 45). It was further charged that in other industries it was considered proper for stairways of this character to have double rails or even a toe-board along the sides of the steps or platform (R. 78-79). No one can say at what time or in what manner decedent fell or jumped from the bridge. It is left to conjecture whether he was seized with a dizzy spell or tripped or was caused to fall by some act of his own not connected with the slippery condition of the steps.

An almost identical situation is presented here as that passed upon by this Court in *Atchison, Topeka*

& Santa Fe Railway Co. v. Saxon, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397, and *Chicago, Milwaukee & St. Paul R. R. Co. v. Coogan,* 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041. In the former, the Court, speaking through Mr. Justice McReynolds, in 76 L. Ed. at page 398, says:

> "While employed as head brakeman by petitioner Railway Company and engaged in interstate commerce, J. W. Moore sustained fatal injuries at a New Mexico station. His personal representative obtained a judgment for damages, under the Federal Employers' Liability Act in a Texas court.
>
> The Court of Civil Appeals at El Paso reversed this, holding that the evidence failed to show the accident resulted from the carrier's negligence. The Supreme Court granted a writ of error, reversed the Court of Civil Appeals and affirmed the original judgment. It concluded that, viewing all the evidence, there was enough to show negligence and causal connection between this and the death.
>
> The matter is here by certiorari. The Railway sets up a claim under the federal statute which it has not heretofore had opportunity to submit for adjudication to any federal tribunal. The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.
>
> Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence from which

it may be properly concluded that Moore's tragic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. New York C. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 354, 74 L. Ed. 899, 50 S. Ct. 281.

In the language of the Supreme Court the respondent 'recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the Railway Company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed' (Tex.) 36 S. W. (2d) 230.

Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. When last seen the deceased was running westwardly by the side of the train then moving in that direction. Across the pathway commonly used by trainmen, there was a slight depression—estimated to be four or five, or possibly six or eight, feet long and three feet wide—filled with small rock screenings. It was softer than other portions of the way—yielded to the foot. Eight or ten feet west of this witnesses found blood upon the rail.

Two hours after the accident a fourteen-year-old boy discovered the mark of a shoe in the

screenings. He said it 'was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest.' There is no evidence—nothing but conjecture—to show that the deceased made this impression; and, even if he did, we cannot assume that by stepping there he was made to stumble and fall under the moving train.

What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement.

The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Chicago, Milwaukee & St. Paul Railroad Co. v. Coogan* (supra), the evidence showed that there was a bent or loosened pipe alongside of the defendant's railroad tracks at a point where the decedent was required to go to uncouple some cars. In some way while uncoupling the cars the decedent fell under the wheels and was killed. It was the contention of the plaintiff that the decedent slipped or tripped over the bent pipe and fell under the wheels. It was claimed that the defendant was negligent in so maintaining such a pipe alongside its tracks and that such negligence proximately caused the death of the decedent. To support this contention a mark on the outside of decedent's shoes was displayed for the purpose of attempting to show that he slipped upon the pipe. This Court, at page 566, says:

"The case was tried, and respondent supports the judgment, on the theory that, when the switch engine stopped after the last coupling, deceased went between the caboose and car to couple the air hose; that he stepped between the rails with his right foot, leaving his left foot outside the south rail and between it and the pipe line; that, stooping to reach the air hose his left foot slipped backward under the bent pipe; that, before he had time to make the coupling, the cars were started backward in the movement to clear the switch; that, when he attempted to straighten up, his left foot was caught under the pipe, and he was forced backward, run over, and killed. It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. *Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed.* United States v. Ross, 92 U. S. 281, 284, 23 L. Ed. 707; Manning v. Insurance Co., 100 U. S. 693, 698, 25 L. Ed. 761. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred that he postponed effort in that direction until after all the switching had been done and until the engine had hold of the string of cars. And then it must be inferred that he went be-

tween the cars in the manner claimed—his right foot between the rails, leaving his left foot outside, where, it is argued, it was caught under the bent pipe.

The 'rounding depression' on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed, and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down, or later while he was being dragged. But there is nothing to show that the pipe had any connection with the accident. * * *

When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture."

In each of the foregoing cases there were no eye-witnesses to the accident and what actually caused the decedent to fall was unknown. There was the

testimony relative to the footprint in the soft ground in the *Saxon* case and the mark on the shoe of the decedent in the *Coogan* case and it was claimed that this evidence was sufficient to show that the decedent in the *Saxon* case was caused to fall under the cars by reason of the soff ground, and in the *Coogan* case by reason of the bent pipe alongside the tracks. In the case at bar there is only the testimony relative to the sheep hairs, alleged blood spot and bruise on decedent's head to support the claim that he was caused to fall into the water by the slippery condition of the stairs and the absence of a lower railing. We see no distinction between these three cases. In each case it might be surmised that the decedent was caused to fall by the alleged negligent act of his employer, but this Court has repeatedly held that a judgment under this act cannot be supported solely by surmise and speculation.

It is clearly not sufficient, as the California District Court of Appeal seems to hold in this case, to merely prove negligence without proving that the decedent's death was due to such negligence. Not only was it incumbent on respondent to prove that the steps were unsafe, due to their slippery condition and single rail, but it was necessary to prove that the fall and death of decedent were proximately caused thereby.

In *Atchison, Topeka & Santa Fe Railway Co. v. Toops*, 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896, Mr. Justice Stone, at page 899, says:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained

of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 371, 62 L. Ed. 1167, 1170, 38 Sup. Ct. Rep. 535; St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 347, 70 L. Ed. 979, 983, 46 Sup. Ct. Rep. 520; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 Sup. Ct. Rep. 564; New York C. R. Co. v. Ambrose, decided February 24, 1930 (280 U. S. 486, ante, 562, 50 Sup. Ct. Rep. 198).

Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death."

DECEDENT ASSUMED THE RISKS INCIDENT TO HIS EMPLOYMENT ON THE BRIDGE, INCLUDING THE USE OF THE STAIRWAY IN ITS THEN CONDITION.

This Court in the leading case of *Seaboard Air Line Railway Co. v. Horton,* 233 U. S. 492 (58 L. Ed. 1062, at 1070), with respect to the doctrine of assumption of risks, says:

"* * * On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be

present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*" (Italics ours.)

We believe a clearer case of assumption of risk would be hard to find than the one presented here. The evidence shows that although decedent was only employed at night he had been working on the bridge continuously for six months before the accident; that his duties there were to open and close the bridge to permit boats to pass through; that in order to permit a boat to pass through it was necessary for him to traverse this stairway four times (R. 43-45). The testimony shows that when a boat whistled to go through the bridge the operator had to go up the stairs to the engine house on the top of the bridge and throw the semaphores and open the bridge. He

then had to go down the stairs and go to each end of the draw and see that the rails were in proper alignment. He then had to return up the stairs to the engine room, throw the semaphores to permit the trains to cross the bridge and then descend the stairs to reach the little house where he customarily remained. The testimony further showed that it was necessary for the operator to have either a lantern or a flashlight to accomplish this work, and that lanterns in good condition were furnished by the company for this purpose (R. 60-61). Clearly, therefore, the decedent had gone up and down this stairway hundreds of times before the night of the accident, during all of which time he carried a lantern or a flashlight. The stairs were somewhat steep and it was customary to hold on to the railing in going up or down them. How can it possibly be said that any person of the most limited intelligence would not have observed and known that there was only one railing on the stairs and platform? The decedent was a man of ordinary intelligence. The ordinary knowledge and experience in human affairs tells us without any question that he could not have traversed this stairway hundreds of times in the course of his duty without being aware of its physical characteristics. The same is true of the alleged slippery condition of the stairs. The testimony discloses that the stairs were slippery when wet. There is no evidence, however, that the stairs were wet at the time Bobo fell off the bridge. The testimony further discloses that nearly every night during the winter dew collected on the stairs, rendering them slippery (R. 47). No one cer-

tainly could have been more aware of this condition than the decedent. His hours of duty were from 9:00 p. m. to 5:00 a. m. and he was in a better position to observe the wetness of the steps than anyone else. Having gone up and down these stairs hundreds of times at night with a lantern and with his hand on the rail and with his feet on the alleged wet and slippery steps, it is to do violence to sound judgment or ordinary human experience to say that he was not aware of the fact that the stairs when wet were slippery and the danger incident thereto.

In *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, at 285, this Court says:

> "* * * But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience; and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275, and cases there cited. The case at bar falls within this class."

The rule laid down by this Court has been frequently applied by the Courts to situations similar to the one here. We quote briefly from a few of these decisions.

In *Biederman v. Montezuma Mfg. Co.* (Ga.), 116 S. E. 225, the syllabus reads:

> "There being no allegation to the contrary, it must be assumed that the servant (the plaintiff) was of ordinary intelligence, and that he was laboring under no physical defect or disability which rendered him incapable of appreciating the situation and knowing of the dangers incident to his employment. Thomas v. Georgia Granite Co., 140 Ga. 461, 79 S. E. 130. Construing the petition (as it must be construed) most strongly against the plaintiff, it appears that the defects upon the floor which caused him to slip and fall, and thus resulted in the injuries for which he sues, were patent and obvious, *and that he had equal means with the defendant, his master, of knowing thereof.* No cause of action is alleged, and the general demurrer of the defendant was therefore properly sustained."

In *Williams v. Georgia Southern & F. Ry. Co.* (Ga.), 121 S. E. 700, the syllabus reads:

> "Where a servant, while in the discharge of the duties of his employment, in descending from a lamp post with a heavy lamp upon his arm slips and falls upon an iron pipe, and is injured, any insecurity in the place by reason of any negligent maintenance of the post with the lowest step at a height of from four to five feet from the ground, or of an iron pipe protruding above the ground at the base of the post, is as obvious to the servant as to the master. This is true despite any assumption of the risk by the master in giving assurances of safety to the servant. Civil Code 1910, section 3131; Elliott v. Tifton Mill & Gin Co., 12 Ga. App. 498, 77 S. E. 667."

In *Marsh v. Chickering* (N. Y.), 5 N. E. 56, the syllabus reads:

> "Defendants furnished a ladder for plaintiff to use in their employ, in lighting gas-lamps in front of their building. He had notified them several times that it needed spiking, and they had promised to repair it, but did not do so, and, after lighting seven lamps, the ladder slipped, and he was injured. Held, that he could not recover; that the rule making the employer responsible for defective machinery, etc., does not extend to ordinary labor which only requires the use of implements with which the employe is perfectly familiar."

The California Court, in passing on this question in this case, said (R. 114):

> "While it is the rule under the statute that an experienced employee who knows the material conditions must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the danger and the employer was negligent in allowing the danger to remain (Jacobs v. Southern Ry. Co., 241 U. S. 229), here, so far as shown, decedent had never ascended the stairway during the day time, nor was he aware of the conditions which made the structure dangerous."

It will be seen that the California Court wholly ignored that portion of the rule laid down in *Seaboard Air Line v. Horton* (supra) that, where the conditions and the risk are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them, the employee is deemed to assume the same.

It may be suggested by respondent that the defense of assumption of risk was not pleaded in the answer. We merely wish to point out that all of the evidence upon which the defense of assumption of risk depends was adduced from respondent's own witnesses and, having herself disclosed that the decedent assumed the risk which caused his death, she cannot recover, even though it be held that the defense of assumption of risk was not pleaded in the answer.

C. B. & Q. R. Co. v. Shalstrom, 195 Fed. 725 (C. C. A. 8th Circuit), at page 729 the Court says:

> "The agreement of the servant to assume the ordinary risks of his employment and the extraordinary risks thereof that are known to and appreciated by him inheres in and is an inextricable part of his contract of employment, and when that is proved or admitted the assumption of these risks is proved, and no further pleading or proof on the part of the defendant is necessary to establish it. Malm v. Thelin, 47 Neb. 686, 66 N. W. 650; Glantz v. Chicago, B. & Q. R. Co., 87 Neb. 60, 127 N. W. 221; Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814."

Owl Creek Coal Co. v. Goleb, 210 Fed. 209 (C. C. A. 8th Circuit), at page 216 the Court says:

> "It is, of course, conceded that, where the plaintiff's evidence discloses that he was guilty of contributory negligence, the defendant has a right to take advantage of such defense without specially pleading the same. Chicago, B. & Q. Ry. Co. v. Cook, 18 Wyo. 43-48, 102 Pac. 657; Chicago, G. W. Ry. Co. v. Price (C. C. A.), 97 Fed. 423-430, 38 C. C. A. 239; Lake v. Shenango Furnace Co. (C. C. A.), 160 Fed. 887, 88 C. C. A. 69."

We wish to further point out that the case was tried in the Court below on the theory that the defense of assumption of risk was in issue. It appears in the record before this Court (R. 105) that respondent herself proposed instructions in the lower Court on the issue of assumption of risk. It is a familiar rule that a request for instructions to a jury as to an issue is a waiver of the objection that such issue is not presented by the pleadings.

Baltimore etc. Railroad Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

This very point was passed on unfavorably to respondent's contention by the District Court of Appeal of the State of California in this case (R. 113).

In respondent's brief in this Court in opposition to the petition for writ of certiorari, the point was raised that, as no motion for directed verdict was made in the lower Court by petitioner, the sufficiency of the evidence may not be questioned on appeal. In our reply brief in support of the petition for writ of certiorari, we pointed out that all proceedings, prior to the petition for writ of certiorari to this Court, were conducted in the California State Courts and that, under the rules of practice therein, a motion for directed verdict is not required in order to raise the question of the sufficiency of the evidence on appeal.

Dated, San Francisco, California,
November 8, 1933.

Respectfully submitted,
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R. W. PALMER,
Attorneys for Petitioner.